IN THE

Supreme Court of the United States

October Term, 1923.

Nos. 266-267.

AIR-WAY ELECTRIC APPLIANCE CORPORATION,
Appellant.

vs.

HARRY S. DAY, TREASURER OF THE STATE OF OHIO, ET. AL.,
Appellees.

HARRY S. DAY, TREASURER OF THE STATE OF OHIO, ET. AL.,
Appellants.

vs.

AIR-WAY ELECTRIC APPLIANCE CORPORATION,
Appellee.

Appeals from the District Court of the United States for the Southern District of Ohio.

REPLY BRIEF FOR APPELLANTS IN CASE NO. 266 AND APPELLANT'S ANSWER BRIEF IN CASE NO. 267.

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Solicitors for Appellant in Case No. 266 and for Appellees in Case No. 267.

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APPELLANT'S REPLY BRIEF TO APPELLEES' BRIEF IN CASE NO. 266.

ARGUMENT.

Appellees, in their brief, practically submit their case on the two opinions of the District Court as set out at pages 34 and 51 respectively of the record. The first

of these opinions has been reported in 279 Fed. 878. Outside of the reference to the two opinions mentioned, there are but two other points raised in the argument which we will hereafter discuss.

At the outset of this, our reply brief, we wish to request the court to consider with us the two opinions above mentioned, wherein we respectfully claim that the court committed several grievous errors in answering the following questions:

I.

Is Section 8728-11 of the General Code of the State of Ohio retroactive in effect? Which question the court answered in the negative, Record, pages 36, 37 and 38.

II.

Does the method set forth for the computation of the fee provided for by said Section 8728-11 create a burden upon interstate commerce? Which question the court answered in the negative, Record, pages 38, 39 and 40.

III.

Does the statute deprive appellant of property without due process of law? Which question the court answered in the negative, Record, page 40.

IV.

Does Section 8728-11 of the General Code of Ohio deny to appellant the equal protection of the law? Which question the court answered in the negative, Record, pages 41, 42 and 43.

V.

Is Section 8728-11 of the General Code of Ohio unconstitutional because of the inequality of its burden upon different foreign corporations or between foreign and domestic corporations? Which question the court answered in the negative, Record, page 43.

VI.

Does Section 8728-11 of the General Code of Ohio violate the provisions of the United States and Ohio Constitutions relative to the taking of private property without due process of law? Which question the court answered in the negative, Record, page 44.

I.

Is Section 8728-11 of the General Code of the State of Ohio Retroactive in Effect?

We submit that the District Court was in error in holding that Section 8728-11 of the General Code of Ohio was not retroactive in effect. Record, pages 36, 37 and 38. This section was part of an Act entitled "To Amend Sections 8728-1, 8728-2, 8728-4, 8728-6, and 8728-11 of the General Code Relating to the Formation and Organization of Corporations with Common Stock Without Par Value." The Act was signed by the Governor on May 14, 1921, and filed in the office of the Secretary of State on May 17, 1921.

The provisions of the Constitution of the State of Ohio relative to the time within which laws shall go into effect are as follows:

Article II, Section 1-c:

> "* * * No law passed by the General Assembly shall go into effect until ninety (90) days after it shall have been filed by the Governor in the office of the Secretary of State, except as herein provided. * * *"

Article II, Section 1-d:

> "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the General Assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum."

Article II, Section 28, provides that the General Assembly shall have no power to pass retroactive laws.

It is appellant's contention, since there was no emergency clause placed within the Act, that it could not possibly go into force and effect until August 17, 1921. The appellant was required to file its report to the Tax Commission of the State of Ohio during the month of July, 1921, and the tax became a lien upon the property of appellant from the 1st day of July, 1921. Hence, if the contention of the state officers was correct, this law has a retroactive effect upon appellant.

The lower court held that this section was a section for general revenue and therefore went into force and effect immediately. There is only one clause in Section 1-d of Article II of the Constitution under which it might be claimed this law came, and that is, laws providing for "tax levies". We submit that this law which provides

for the organization of corporations with common stock without any nominal or par value, and the filing fee for the filing of the articles of incorporation, and the opening of books of subscription, and the sales of stocks, or rights of creditors, or payments of dividends, the redemption of preferred stock, and borrowing capacity, the increase or reduction of stock or the fee therefor, and the reorganization of existing corporations in pursuance to the Act, and the filing of certain affidavits as to debts as liabilities, does not in any way constitute a law for a tax levy. The first paragraph of Section 8728-11 relates to the fees payable by domestic corporations. The second paragraph of said section first provides for the amount of fees a foreign corporation must pay under Sections 184 and 185 of the General Code of the State of Ohio as its permit fee. The last part of said section provides for the annual franchise fees of foreign corporations, as herein discussed. Fees payable under Sections 180, 184 and 185 are payable to the Secretary of State. Fees payable under Section 5503 are payable to the Treasurer of the State. Under what construction can it be said that those fees payable to the Secretary of State are taxes, and that the law containing the language relative thereto, as found in Section 8728-11, is a law levying a tax? The fees provided for in Sections 180, 184 and 185 are license fees for the permission of a foreign corporation to come into and do its first year's business within the State of Ohio. The fee payable by a foreign corporation once admitted to do business in Ohio, and after it has paid its first year's license fee, is nothing more than a fee exacted for the privilege to be enjoyed of doing business within the state. This, likewise, we submit, is a license fee and not a tax, and the law providing for the same is not a law levying taxes.

We submit that when an Act was passed as an entirety, as the Act in question was, and entitled as the Act in question was, it cannot be segregated into sections for the purpose of ascertaining at what time the various sections should go into force and effect, unless the legislature so specifically stated. If the court were inclined to believe us mistaken in this conviction, we assert, as hereinbefore indicated, that Section 8728-11 contains at least three references to matters which could not possibly be called "tax levies". If the court believes it is the law that sections could be segregated in determining at what time the particular sections go into force and effect, we submit that that view cannot be carried far enough to allow the segregating of a particular phrase or clause so that those particular phrases or clauses go into force and effect at one time, and the remaining phrases or clauses in that particular section go into force and effect at another time.

Another reason for our contention that the law is not one providing for a tax levy is, that the remedies of the state for failure to pay the fee are not such as is usual in cases of failure to pay a tax levied on specific property. Then, too, in Ohio a franchise is not considered property. If it were property it would have to be taxed uniformly as provided in Section II, Article XII, of the Constitution of the State of Ohio.

We call attention to the fact that this issue was not raised by the pleadings, as the answer of appellees admitted that the law did not become effective until August 17, 1921.

II.

Does the Method Set Forth for the Computation of the Fee Provided for by Said Section 8728-11 Create a Burden Upon Interstate Commerce?

The lower court answered this question in the negative, because the statute itself provides for a fee of five cents (5c) per share *upon the proportion* of the number of shares of authorized common stock represented by property owned and used and business transacted in this state, Record, pages 38, 39 and 40.

Had not a similarly worded statute been interpreted by the Supreme Court of the State of Ohio in the case of *State ex rel. vs. Fulton,* 98 Ohio State 350, we would submit the interpretation of the words "authorized common stock represented by property owned and used," to mean "issued stock," for unissued stock can represent nothing. If the interpretation placed on that wording by the Supreme Court of Ohio is the true meaning of the same, we submit that said statute is unconstitutional, for reasons hereinafter discussed. We cannot subscribe to the interpretation given this language by the Supreme Court of Ohio, for there the court, after discussing the question, said, on the bottom of page 355:

> "• • • We do not subscribe to this view. It is to be presumed that a foreign corporation will transact at least some business and own some property outside of Ohio and the term 'proportion' is employed in the section upon that theory • • •."

The reason given by the court for its position, as above quoted, we respectfully submit, is unwarranted in fact, for the section under discussion at that time was what is known as Section 184 of the General Code of the State of Ohio, relating to the first license fee to be paid

by a foreign corporation to the Secretary of State. The corporation paying said franchise fee must make a statement prescribed under Section 183 of the General Code of the State of Ohio, which says in part:

> "Before doing business in this state, a foreign corporation organized for profit *and owning or using a part or all of its capital or plant in this state* shall make and file with the Secretary of State, * * * etc." (*Italics ours.*)

In face of such a statement by the legislature, the Supreme Court of Ohio states in its opinion that it is to be presumed that the foreign corporation will transact at least some business and own some property outside of Ohio. The same language that we have italicized in quoting Section 183 appears in Section 5499 of the General Code of the State of Ohio, requiring foreign corporations to make their annual report during the month of July. The construction placed upon such wording by the Supreme Court of Ohio amounts to the taking of property without due process of law, and violates the provisions of the property sections of the Constitution of the State of Ohio, and, in a case like the one at bar, creates a burden upon interstate commerce.

It was stated by the court that the language above excludes any attempt on the part of the State of Ohio, or its officers, to create a burden on interstate commerce. Were the wording of the statute changed, we could subscribe to the holding of the court. The change which we consider requisite would be the inserting of the words "issued common stock" instead of "authorized." However, as the statute is now constituted, we take issue with the Ohio Supreme Court's conclusion, for it cannot logically be said by anybody that unissued stock represents or could represent any sort of property, or any business transacted or to be transacted. The selling of its

own stock by a foreign corporation in another state is not considered as transacting business therein.

As the Legislature of the State of Ohio prescribes that a meaningless factor should be used in the computation of the fee, (*authorized* stock), the result is that the fee is computed by an unfair method. Were the statute interpreted or worded so that the fee would be chargeable upon that proportion of the issued stock representing property owned and business done in the State of Ohio, the amount of the same chargeable against the appellant corporation would be but One Thousand Eight Hundred and Eighty-one and Eighty-five Hundredths Dollars ($1,881.85), instead of Twenty Thousand Dollars ($20,000.00). The result of such unfair methods is that appellant corporation must pay a tax of approximately Eighteen Thousand One Hundred Dollars ($18,-100.00) more than it should be required to pay.

It is engaged in both intra- and interstate commerce, but more than two-thirds of its business is business in interstate commerce. That business must bear the brunt of the burden of paying such an excessive fee, and it is a substantial burden and not a remote or inconsequential one. Hence we submit that, even though the Legislature did, by the wording of the Act, seemingly intend to exclude burdening interstate commerce, it has, by the method of computation employed by the Act, created a terrific burden upon said commerce.

It is entirely possible for a statute to state on its face that the Legislature is not intending to burden interstate commerce, yet the statute may be so worded as to cause that result to be reached.

> "But it is said that none of the authorities cited are pertinent to the present case, because the state expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the telegraph

company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show. * * *" *Western Union Telegraph Co. vs. State of Kansas ex rel. Coleman, Attorney General,* 216 U. S. 1, 27, *speakirg through Justice Harlan.*

III.

Does the Statute Deprive Appellant of Property Without Due Process of Law?

The lower court dismisses this question at the end of a paragraph, page 40 of the Record, wherein nothing but the effect of the statute upon interstate commerce was discussed.

> "The statute in question does not offend the commerce clause of the constitution. In view of the conclusion thus reached, it is clear that the act properly construed does not deny to plaintiff *due process of law* and that plaintiff may not be taxed on its interstate business and on the proportion of its *authorized* stock represented by property owned and used and business transacted in other states." (*Italics ours.*)

We prefer to discuss this question under heading No. VI.

IV.

Does Section 8728-11 of the General Code of Ohio Deny to Appellant the Equal Protection of the Law?

The lower court answered the above question in the negative upon the theory that a state has the right to discriminate as between foreign corporations and domestic corporations, in respect to the amount of a franchise fee to be paid, Record, pages 41, 42 and 43. The general law is, that a state may even go so far as excluding foreign corporations from its borders. In the instant case, the State of Ohio did not exclude appellant from its borders, but by the invitations contained in the statutes of the State of Ohio, received appellant within its confines. All permit fees and its first franchise fee were paid and appellant thereupon was taken out of the class of foreign corporations and placed in another class, which should be termed "domesticated foreign corporations."

The Supreme Court, speaking through Justice Day, laid down as the law covering an identical situation in the case of *Southern Railway Company vs. Greene*, 216 U. S. 400, 416, 417, 418, the following:

> " • • • We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business.
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> • • • • •
>
> "We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is within the meaning of the Fourteenth Amendment a person within the juris-

diction of the State of Alabama and entitled to be protected against any statute of the state which deprives it of the equal protection of the laws.

"* * * It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. * * *

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state and other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position

to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state, does violence to the Federal Constitution."

We do not understand that the holdings hereinabove set forth have been reversed by this court. However, we are fully aware that on some occasions distinctions have been drawn, due to peculiarities of the facts or the statutes involved in other cases. Appellant comes directly within the rulings of that case, in that its property located within the State of Ohio is of a very permanent nature. It is composed of two separate plants or factories, one of which, together with the real estate, is carried on the books of the company in the sum of One Hundred Forty Thousand Two Hundred Twenty-eight and seventy-three hundredths Dollars ($140,228.73). This plant was especially built by one of appellant's predecessor companies for the purposes for which it is now used. Within that plant are machinery, tools, patterns, fixtures, furniture and equipment of a value approximating One Hundred Twenty Thousand Dollars ($120,000.00). The second factory owned by appellant is carried upon the books of the company, together with the real estate upon which the buildings are situated, in the sum of One Hundred Twelve Thousand Five Hundred Thirty and Eighty-eight Hundredths Dollars ($112,530.88). Other property, exclusive of merchandise or materials in that factory, in the way of machinery, patterns, tools and dies, fixtures, etc., amounts to approximately One Hundred Thousand Dollars ($100,000).

The evidence shows that both plants are very well equipped for the purposes for which they are used, and adaptable to no other purpose without spending a large sum of money in changing machinery, tools, fixtures, etc., and that were either one of said plants placed upon the

market at the time of the bringing of this suit, or at any other time within the next two or three years, the plaintiff corporation could not realize anywhere near the value hereinabove set forth, which, the evidence shows, is a fair and reasonable value at the time. See affidavit of Lawrence G. Pierce, pages 24 and 25 of the Record.

This property is not of the nature of the property discussed in the cases of *Baltic Mining Company vs. Massachusetts,* and *S. S. White Dental Manufacturing Co. vs. Massachusetts,* 231 U. S. 68, or that concerned in the case of *Cheney Brothers Co. vs. Massachusetts,* 246 U. S. 147. It is of small comfort to appellant to be told by the lower court, in face of the record above mentioned and the positive sworn statements contained in the bill of complaint to the contrary, that (Page 44 of the Record):

> "• • • The investment in enterprises of like character must be large. The sale or leasing of factories such as the plaintiff owns for the production of the same, or allied, or different products in a thriving city, such as Toledo is, is not infrequent. *The Record does not suggest that the plaintiff will be by the franchise tax law subjected to the confiscation of its property, or to great or substantial loss,* or that its property is not readily salable at a reasonable price to other persons in the same or other kinds of business. Plaintiff's investment is not of the permanent character of those made by railroad or telegraph companies, but may be removed from one place to another and its equipment, when so transferred, put to a use like the present. • • •" (*Italics ours.*)

We call attention to the statement made by the court in its opinion, on page 36:

> "Plaintiff charges injunctive relief should be granted because the fee or tax assessed against it constitutes a cloud upon the title to its property, is erroneously computed, excessive, *confiscatory,* and • • • " *(Italics ours.)*

The bill of complaint contains the following language relative to confiscation of property:

> "That said law is unconstitutional in that it *confiscates plaintiff's property without compensation or due process* of law as prohibited by the Fourteenth Amendment to the Constitution of the United States of America, which provides:
>
> 'No state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law.'" *(Italics ours.)*

So that the court below was clearly in error when it stated that the Record did not suggest that appellant's property would be confiscated.

Assume that the property above mentioned of appellant corporation could be readily sold, which is contrary to the uncontroverted evidence in this case. Has not appellant other property which would be confiscated by its required removal from the state, and sale?

First, it has the name of the corporation as "Air-Way Electric Appliance Corporation." The words, "of Toledo, Ohio," are not a part of its corporate name. It can be assumed, although the record does not state, that this company had advertised its product, and in most advertisements it can be assumed that the location of the factories was given. Were the company required to move to another state, it would suffer great loss by reason of the fact of the loss of identity which the location of the concern gives to the product. Then, too, the use of the name itself may be preempted in such other states.

How many months of lost production would appellant suffer, were it forced to sell all of its property and move elsewhere?

It must be admitted that it would be a stupendous proposition to move such a vast amount of machinery, tools, etc., and that it would consume months and not weeks. What the loss would be under such circum-

stances, is problematical, of course, but, we submit, prohibitively heavy. It is not like moving such tools as would be moved in the ordinary garage or other like institution. Then, too, the cost of moving, we submit, would not be inconsequential. The Record shows that this corporation has in its employ from two to five hundred skilled workmen at times. This court cannot assume that there is no value connected with an organization doing the business which appellant company does, nor can it assume that appellant could move its organization or even the nucleus thereof elsewhere. It must be admitted that the loss of such an organization and the training of new people in a new locality would be tremendously expensive.

Of what avail is the equal protection of the law clause of the Fourteenth Amendment, if the cost and loss of selling or moving its plant and organization, etc., is so high as to require appellant corporation to abandon its parent state of choice and reform itself into an Ohio corporation? If such were the law, no corporation could do business beyond the confines of the border of the state of its creation, for, even though some other state might admit it to do business therein, there is no protection granted it by any provision of the Constitution of the United States, and all foreign corporations must cease to exist as such. And there would be nothing to prevent such other state from doing what Ohio did after the corporation was created, and increase the annual franchise fee by 400 per cent.

If this court is inclined to believe, in considering the case at bar, that the rule of law is that there can be discrimination in taxation between domestic corporations and domesticated foreign corporations, we submit that that discrimination cannot be such as will drive or force such domesticated foreign corporation from within the

confines of a state or to so burden that domesticated foreign corporation over and above the burden placed upon the domestic corporation that it cannot sell its product in competition with those domestic corporations competing against it.

We again respectfully submit that the salutary rule of law is the one laid down by this court in the case of *Southern Railway Company vs. Greene, supra.* We quote from the language of the late Chief Justice White in the case of *Western Union Telegraph Company vs. State of Kansas,* 216 U. S. 1, 50, 51:

> "• • • In other words, this case involves determining, not how far a state may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a state may take its property within the state without compensation upon the theory that the corporation is not in the state and has no property right therein which is not subject to confiscation. The difference between the premise upon which the proposition contended for rests and the situation here presented seems to me self-evident. I say this because my mind fails to perceive how the doctrine of election or voluntary assumption of an unconstitutional burden can have any possible application to a case like this. • • •
>
> " • • • If the unconstitutional burden be not assumed, *local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated.* If, on the other hand, the unconstitutional burden be borne, a like result takes place.
>
> "• • • *But I cannot assent to the correctness of the contention insofar as it asserts that the state may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquiescence or implied invitation, such a situation to arise, the state may treat the corporation as if it had never come in and its*

property within the state as if it were wholly out of the state, and despoil the corporation of its rights and property upon such false assumption." (Italics are ours.)

Absolute equality and uniformity is impracticable, perhaps, in any known system of taxation, and if an approximation to equality is reached, a law might be declared constitutional. However, it has always been the law that inequalities that result from hostile discrimination and are not occasional or incidental in the operation of a general tax system, become obnoxious to the equal protection clause. There are no cases in Ohio involving Ohio statutes deciding that the system used for charging fees against domesticated foreign corporations as distinguished from domestic corporations, is constitutional. The system of charging a percentage on the amount of subscribed, issued and outstanding stock against domestic corporations, and a percentage on the amount of the proportion of the authorized stock as against foreign corporations, has been in vogue in Ohio, it is true, since 1894. However, the percentages charged varied from one-tenth of one per cent (1/10%) to three-twentieths of one per cent (3/20%), until the advent of stock without par value, when the charges upon stock without par value were fixed. They were first fixed at ten cents (10c) a share on the subscribed, issued and outstanding stock of a domestic corporation and one cent (1c) for each share of authorized stock of a foreign corporation. Later (and after appellant had established itself in Ohio), by the Act of 1921, 109 Ohio Laws 273, the rate was increased to five cents (5c) a share for the authorized stock of foreign and decreased to five cents (5c) a share for the issued stock for domestic corporations.

The court will observe that the amounts chargeable, on either plan of computation, on stock with par value,

because of the smallness of the multiplier, would be exceedingly small and so small, in fact, that no case can be found, as heretofore pointed out, wherein the question of the denial of the equal protection of the laws has been raised by the domesticated foreign corporation. Then, too, those percentages have only been raised to an extent of five mills on the dollar of authorized stock in the case of foreign corporations, and five mills on the dollar of the subscribed, issued and outstanding stock of domestic corporations. Thus, the reason is apparent why no corporations have heretofore assailed this system of taxation.

The lower court holds that since this same *plan* of computation was in effect at the time appellant corporation was admitted to do business in the State of Ohio (although under that plan its fee was only twenty per cent (20%) of the fee assessed under the amended statute), it is now estopped from claiming such a system as being unconstitutional. We respectfully submit that no such holding can be sustained by the authorities. (See the language of the late Chief Justice White, above quoted.) *Western Union Telegraph Co. vs. State of Kansas, ex. rel. Coleman*, 216 U. S. 1, 50, *supra.*

Another reason given for the court's holding that there can be no claim of violation of the provision in respect to the equal protection of the laws, is that the plaintiff voluntarily created and maintains the position in which it has found itself, to-wit: what the court refers to as "improvident capitalization." There is no contention but what appellant went into court with clean hands, nor that it was trying to do other than equity. It did not go into court for the purpose of being told how to manage its own affairs. It has been the law, from the time that memory of man runneth not to the contrary, that a court of equity will not assume the responsibility of man-

aging a corporation or of guiding its affairs, except through one of its own officers, or under circumstances of fraud.

When it came into Ohio, appellant paid to the State of Ohio, in conformity with the statute then in force, Four Thousand Dollars ($4,000.00) for the privilege of doing its first year's business within that state. It is now ordered by the state authorities to pay the State of Ohio Twenty Thousand Dollars ($20,000.00) for carrying on that same business. The State of Delaware created appellant corporation into a citizen of its own. The State of Delaware did not object to giving appellant authority to issue four hundred thousand (400,000) shares of its stock. The State of Ohio did not object, upon the admission of the corporation to do business within the State of Ohio, to the fact that it had four hundred thousand (400,000) shares of non par value stock. Nor does the State of Ohio, at this time, object to the capitalization of the company.

It might be assumed that the organizers of this company were reasonably sane and prudent men. The inference is, in the Record, that this corporation's holdings resulted from a purchase or a merger of other corporations. It cannot be called imprudent, nor can its managers be classed as unbusinesslike, because they have been looking forward toward the future. Perhaps the merger or amalgamation with companies manufacturing other household electric appliances is contemplated. It should not be condemned for holding on to all of the authority extended to it by the state of its creation.

The constitutions of the State of Ohio and the United States were enacted for the purpose of protection. The Supreme Court of the United States, speaking through Mr. Justice Pitney in the *Ohio Tax Cases,* 232 U. S. 576, 589, referring to a decision of the Supreme Court of the

State of Ohio in the case of *Southern Gum Co. vs. Laylin*, 66 Ohio State 578, said as follows:

> "An examination of the state decisions cited in the Laylin case with others referred to in the opinion of the District Court, and in the briefs of counsel, convinces us that the District Court was correct in its conclusion that the state court, in the Laylin case, dealt with a general law and its operation on all corporations of given classes throughout the state, and not with its effect upon specific financially weak corporations; that it was not intended to hold that the courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional."

We submit that the general operation of the law in question is confiscatory and oppressive. It cannot be successfully contended that every foreign corporation, or that the majority of foreign corporations doing business within the State of Ohio, or corporations generally throughout the country, have issued all of the stock which they have authorized. It is the known practice of corporations to have unissued, large amounts of stock, the amounts varying with the purposes to which it is ultimately intended to be put. The record does not disclose, and it could not properly disclose, how many foreign corporations having stock without par value have been admitted to do business in Ohio, nor the amounts of unissued stock. There must be many foreign corporations doing business in Ohio either with stock of par value or stock without par value, who own all of their property in the State of Ohio. This is not an incidental case. It is a case which might reasonably be expected to arise at any time or to have already arisen in the State of Ohio. A similar condition arose in the case of *Hump*

Hair Pin Co. vs. Emmerson in Illinois Supreme Court Reporter Advance Sheets May 1, 1923, page 305. This case was filed prior to the first of December, 1921, at which time the fee was supposed to have been paid. No other cases have been started to our knowledge. We are sure we are not wrong in assuming that there are many other foreign corporations finding themselves in identically the same position in which appellant has found itself, which are awaiting the outcome of this case.

We respectfully submit that there is a real and hostile discrimination which amounts to a violation of the equal protection clause of the Constitution of the United States, apparent in this case.

V.

Is Section 8728-11 Unconstitutional Because of the Inequality of Its Burdens Between Foreign and Domestic Corporations and Between Different Domesticated Foreign Corporations?

By inference the lower court answered this question in the negative, for the law was upheld as constitutional and there was no discussion as to the difference in rate charged a domesticated foreign corporation having par value stock and a domesticated foreign corporation having non par value stock. The question as to the inequalities between domesticated foreign corporations and domestic corporations has been treated under the preceding head. We contend that there is a hostile discrimination between domesticated foreign corporations having par value stock and those having stock without par value. The one is charged three-twentieths of one per cent (3/20%) *upon the proportion of its issued authorized stock* and the other five cents (5c) a share *upon the pro-*

portion of its authorized stock. It can be assumed, without violence, that a corporation having par value stock has received approximately the equivalent to the par value of its shares for the same. The Supreme Court of the United States, speaking through Justice Bradley, *Bells Gas Railroad Co. vs. Pennsylvania,* 134 U. S. 232, says:

> "The presumption is that corporate securities are worth their face value."

Therefore, the tax on each one hundred dollars par value of stock of a domesticated foreign corporation having stock with par value, is fifteen cents. There can be no presumption as to the value of non par stock, except it can be presumed that it has a value, merely. Its value may range from one dollar or below, to one thousand dollars, or ten thousand dollars, or any other amount. It is likely there are domesticated foreign corporations having stock of the value, for instance, of seven dollars per share, as happens to be the value fixed by the State of Ohio at which the appellant might dispose of its stock, and like corporations with stock selling at one hundred dollars per share. It is not just and it is not reasonable to tax a corporation which cannot sell its stock at more than seven dollars on a basis of five cents a share and then allow domesticated foreign corporations with par value stock of one hundred dollars to pay only a tax of fifteen cents per share and, we submit, it is not constitutional to charge appellant corporation or to require appellant corporation to pay a fee of five cents a share on the stock at its fixed value, when another domesticated foreign corporation having stock without par value may pay only five cents a share on stock worth one hundred dollars or more.

We submit that such a law is in violation of the equal protection of law clause of the Constitution of the

United States, that it amounts to the taking of property without due process of law, and that it is contrary to the property provisions of the Constitution of the State of Ohio in that its private property does not remain inviolate.

VI.

Does Section 8728-11 Violate the Provisions of the United States and Ohio Constitutions Relative to the Taking of Private Property?

This question, which the court answered in the negative, has been partially discussed under previous headings. We refer the court to a statement in the opinion of the District Court, Record, page 44, which has not heretofore been called to its attention:

> "Prudent managers of foreign corporations doing business in Ohio will have no occasion to charge in good faith that the statute is confiscatory or denies their companies the equal protection of the laws."

We have heretofore commented on this phase of the opinion of the court below and have also pointed out that the court, on page 44, says in substance that there is no complaint made as to the confiscation of its property. In addition to the evidence on that question heretofore pointed out, we call attention to "Exhibit A" attached to the affidavit of S. E. Forney, Record, pages 30 and 31, wherein a representative of the appellant, in a letter to the Tax Commission of the State of Ohio, said as follows:

> "You of course fully realize that the assessment of a tax in the amount of $20,000.00 upon a company of this kind, is confiscatory and unreasonable."

We therefore respectfully submit that the result of the provisions of Section 8728-11 is a deprivation of the private property of appellant corporation, and that the record so shows.

VII.

Second Opinion of the District Court.

The District Court in its first opinion, announced that it would hold jurisdiction of the case at bar until such time as the plaintiff made a new application to the Tax Commission of the State of Ohio for the purpose of obtaining the right to amend the original report as made in accordance with the contentions of appellant, to-wit, that part of its business was business transacted in interstate commerce. Pursuant to the suggestions of the court, the appellants did file with the Tax Commission a new application for leave to amend its report. (Record, pp. 16-17.) The Tax Commission, having denied that it had any jurisdiction over the matter at that time, refused appellant the right to amend said report. Thereupon appellant filed a supplemental bill of complaint setting forth the facts, which came on for hearing before the court, and the District Court found that the Tax Commission should have granted the right to appellant to amend its report, but inasmuch as the Tax Commission had denied that right, the court proceeded to determine the amount of the authorized stock which represented appellant's business done in interstate commerce and figured the fee due the State of Ohio accordingly. After completing its discussion of the above mentioned matter, the court stated in its opinion as follows:

> "The plaintiff contends that we held, in our former opinion, a statute constitutional which taxes a domesticated foreign corporation with 400,000 shares of non par value common stock, of

> which but 50,485 shares are subscribed, issued and outstanding, a franchise fee of $20,000 and a domestic corporation with identically the same number of shares of stock authorized and outstanding
>
> a fee of $2534.25. The opinion warrants no such conclusion. The plaintiff voluntarily entered the state for the transaction of business. * * *" (Record, page 55.)
>
> "* * * The plaintiff asks the court to relieve it from an anomalous situation which it voluntarily and improvidently created. * * *" (Record, page 57.)

We repeatedly called that court's attention to the fact that at the time appellant entered the state, its annual franchise fee was only Four Thousand Dollars ($4000.00), which it was entirely satisfied to pay.

We have also heretofore, under appropriate headings, discussed the right of a court of equity to manage or direct the affairs of a corporation and deny equity to a corporation which has complied not only with all of the laws of the state of its nativity or creation, but all of the laws of the state of its domestication.

We submit that as long as appellant corporation came into court with clean hands, has done and is doing equity, a court of equity has no right to deprive it of the protective provisions of the Constitution of the United States and of the State of Ohio. We believe that the court will take judicial notice that practically all corporations are incorporated with more authorized shares than are immediately to be issued. There is nothing in business or morals which forbids this usual procedure. We have examined the analysis of the financial statements of fifty corporations, contained in the first fifty pages of Poor and Moody's Industrial Corporation Manual, under date of 1923, and find that more than eighty per cent of all of the corporations listed upon those pages

have more authorized stock than issued. This supports our contention that appellant corporation has pursued only the natural course in its capitalization.

VIII.

The State of Ohio, If Not in Fact, Did Practically Fix the Value of Appellant's Stock.

Appellees' contention in their brief is that the State of Ohio did not fix the value of appellant's shares of stock through its Securities Department. Literally, this is true. However, the state did issue a certificate allowing the sale of the stock at seven dollars per share, after making the findings prescribed in Section 6373-16 of the General Code of Ohio, that appellant's business was not fraudulently conducted, that the terms of disposal were not grossly unfair, and that it was solvent. Logically, the corporation would not sell its stock for much less than it was worth, nor would the state allow the corporation to sell the same for more than it was worth. Applying common sense and reason to the facts, the result is attained that the State of Ohio had in one of its departments facts which showed a value of appellant's stock satisfactory to that State Department and to the corporation, yet in fixing the privilege fee, the same state overlooks or sets aside that which must necessarily be an approximation of the true value and considers only an arbitrary value. As foreign corporations having par value stock are charged fifteen cents on each hundred dollars par value and a non par value foreign corporation with shares of the value of seven dollars each, is in effect charged on a basis of an arbitrary value of thirty-three and one-third dollars per share, we submit, this amounts to confiscation of property in violation of the Fourteenth Amendment of the Constitution of the United

States and the provisions of the Preamble of the Constitution of the State of Ohio that private property shall forever remain inviolate, and a denial of the equal protection of the laws.

CONCLUSION.

We submit that this statute is unconstitutional offending both the Constitution of the United States and the State of Ohio, because its operation results in a charge made against a domesticated foreign corporation for the annual privilege of doing business within the State of Ohio of the sum of Twenty Thousand Dollars ($20,000) and against an identical domestic corporation engaged in the same line of business, for the same privilege, of but Two Thousand Five Hundred Thirty-four and Twenty-five Hundredths Dollars ($2,534.25); that the system used by the State of Ohio in charging a domestic corporation upon subscribed, issued and outstanding common stock and a domesticated foreign corporation upon authorized common stock, is unconstitutional; that the fixing of an arbitrary charge on non par value stock, without any reference whatsoever to the value of the same, is violative of the provisions of both the Constitution of the United States and of Ohio, and that a direct burden is placed upon interstate commerce.

For the foregoing reasons and for the other reasons assigned in appellant's original brief and in this, its reply brief, we submit that appellant was and is entitled to an injunction restraining the various officers of the State of Ohio from collecting any tax under Section 8728-11.

BRIEF FOR APPELLEE IN CASE NO. 267.

ARGUMENT

In answering the brief of appellants (state officers) in case No. 267, we will discuss the following propositions in the orders named:

1. A Court of Equity has the right to correct a mistake made by the taxpayer in reporting its property for taxation.

2. The words "business transacted," as used in Sections 5499, 5503 and 8728-11 of the General Code, do not include the manufacturing costs of products sold in interstate commerce.

3. Power of Supreme Court to consider question not raised by pleading or evidence.

I

A Court of Equity Has the Right to Correct a Mistake Made by the Taxpayer in Reporting Its Property for Taxation.

At the time of the filing of the original return, the corporation reported that all of its business was handled from Ohio and gave the amount thereof as Two Hundred Fifty Thousand Five Hundred Ninety-four and fifty-eight hundredths Dollars ($250,594.58). Later, an application was made to the Tax Commission to allow the corporation to correct its return so that it would reflect truly the business done in the State of Ohio, which amounted to Seventy Thousand Six Hundred Two and thirty hundredths Dollars ($70,602.30), and the balance represented the amount of business done in interstate commerce. The power of the court in the proper case to order the correction of such a return or to correct the

return, cannot be successfully disputed, nor can it be said that the corporation is estopped from requesting such correction. *City of Wilmington vs. Ricaud,* 90 Fed. 214, C. C. of A. 4th C; *Brown vs. French,* 80 Fed. 166, C. C. Mont.; *Wells-Fargo and Co. vs. Johnson,* 205 Fed. 60, 76; *Cooley On Taxation,* Volume II, page 1447; *City of Charlestown vs. County Commissioners,* 109 Mass. 270; *Dunnell Manufacturing Co. vs. Inhabitants of Pawtucket,* 73 Mass. 277; *Town of Clinton vs. Town of Haddon,* 5 Conn. 84; *Chicago, Etc. Railroad Company vs. Auditor General,* 18 N. W. (Mich). 536; *C. B. & Q. R. R. vs. Cass County,* 51 Neb. 369; *Hump Hairpin Manufacturing Co. vs. Emmerson,* 258 U. S. 290.

It is contended that the District Court was in error in reducing the tax as assessed from Twenty Thousand Dollars ($20,000.00) to Fourteen Thousand Nine Hundred Twenty-six Dollars ($14,926.00) upon the ground that One Hundred Seventy-nine Thousand Ninety-two and twenty-eight Hundredths Dollars ($179,092.28), represented the amount of business done in interstate commerce and in figuring the amount of authorized stock represented by property owned and business done, the above amount should be excluded. If the statute under which this fee was assessed is constitutional, we submit that the court properly figured the tax so that in the court's opinion, no burden was placed upon interstate commerce and the court was not in error in holding the corporation was not estopped from correcting its return. *Hump Hairpin Manufacturing Co. vs. Emmerson, supra; Looney vs. Crane,* 245 U. S. 178.

II

The Words "Business Transacted", As Used in Sections 5499, 5503 and 8728-11 of the General Code, Do Not Include the Manufacturing Costs of Products Sold in Interstate Commerce.

It is contended for the first time that the lower court, in refiguring the tax, should have considered the cost of manufacturing the articles which were sold in interstate commerce and that the words "business transacted in Ohio" contemplated the inclusion of such manufacturing cost. No such question is raised by the pleadings, nor was any evidence of any kind introduced in the court below by the state officers showing that such an interpretation of the statute was within their minds.

It is conceded by counsel for the cross appellant that a fee of Twenty Thousand Dollars ($20,000.) against the corporation could not be sustained, as there would be a direct burden placed upon interstate commerce by such a charge, under the tax system in vogue in Ohio. The complaint is that the fee, as computed by the lower court, amounting to Fourteen Thousand Nine Hundred Twenty-six Dollars ($14,926.00), is not sufficient and they endeavor now, for the first time, to have a rule of law laid down by which the state will receive a sum of money in excess of that fixed by the court, but less than the Twenty Thousand Dollars ($20,000).

An examination of the printed report which was given to the appellant corporation by the state officers for the purpose of making its return thereon, following Record page 28, does not bear out the present contention. Question 19 asks the amount of business transacted in Ohio during the preceding twelve months was..... Dollars ($.....). Question 23 asks, the amount of

business transacted outside of Ohio during the preceding twelve months was.....Dollars ($.....). There is nothing said any place in the report that manufacturing costs were to be considered. Information as to manufacturing costs was neither requested by the Tax Commission prior to the determination of the tax nor at the time the application for a refiguring of the tax was made. Clearly, the corporation had a right to the benefit of the Tax Commission's settled policy of measuring business transacted by sales, and to now apply a different and more burdensome method would constitute such arbitrary action as offends the equal protection of the laws clause of the Federal Constitution. *Sioux City Bridge Company vs. Dakota County, Neb.*, 43 Sup Ct. Rep. 190; *Sunday Lake Iron Co. vs. Wakefield Township*, 247 U. S. 350, 352, 353; *Raymond vs. Chicago Union Traction Co.*, 207 U. S. 20, 35, 37; *Baker vs. Druesdow*, 68 L. Ed. Op. 53, 55.

It must be presumed that the Legislature intended to lay down a workable rule for the determination of the amount of business transacted by a corporation and, as stated in *State of Ohio vs. Cabin Creek Consolidated Coal Company*, 17 Ohio *Nisi Prius* (N. S.) 60, 63, a rule which "leaves no possible opportunity for the exercise of any discretion by the taxing body." Taking "sales" as the measure of the business transacted is not only easy of application, but affords a basis which can be applied with uniformity and without the exercise of discretion by the Commission. Taking business transacted to include "cost of manufacture" necessitates an extended inquiry into the accounting methods of each corporation and must at best result in an arbitrary division of the sales receipts.

As pointed out in *American Manufacturing Co. vs. St. Louis*, 250 U. S. 459, the case of an annual franchise

for the privilege of continuing to do business within the state is clearly distinguishable from cases where a small fee is charged for the privilege of carrying on a manufacturing enterprise and where the sole basis for the tax is the business transacted. Here, the tax is based, not only upon the business transacted, but also upon the property owned and used, and is not a manufacturing tax.

Even, however, if the statute were open to the construction contended for, the practical effect would be to burden interstate commerce and would come within the ban of the many authorities holding that if the operation and effect of a state law is a burden upon interstate commerce, it is invalid, regardless of the form of the act. *St. Louis Southwestern Railway Co. vs. Arkansas,* 235 U. S. 350, 362; *Mountain Timber Co. vs. Washington,* 243 U. S. 219, 237; *Crew Levick Co. vs. Pennsylvania,* 245 U. S. 292.

Further, such a construction would not obviate the features of the law under which the tax is levied rendering it in contravention of the equal and due process clauses of the Federal Constitution, which are discussed in our brief in support of the Air-Way Corporation's appeal.

III

Power of Supreme Court to Consider Question Not Raised by Pleading or Evidence.

The question presented by the brief of the state officers was not raised by the pleadings nor was any evidence taken upon any such issue as to manufacturing costs and we submit that at this late day this court should not reverse this case for the purpose of allowing the officers of the State of Ohio to change the issues therein

and take evidence upon a matter not raised by the pleadings. The action which the officers of the state desire this court to take is not supported by the decisions cited in their brief. The following excerpt from the opinion of Mr. Justice McKenna in *Thomas vs. Taylor*, 224 U. S. 73, 84, is pertinent:

> "Besides judgment cannot be reversed upon the mere suggestion that upon some other theory than that upon which the case was tried, evidence might have been introduced which might have changed the result."

Rodriguez vs. Vivoni, 201 U. S. 371, 377;
New York, Lake Erie and Western Railroad Co. vs. Estill, 147 U. S. 591, 614;
Pacific Railroad of Missouri vs. Ketchum, 95 U. S. 1, 3.

CONCLUSION.

We respectfully submit that should this court hold Section 8728-11 of the General Code of the State of Ohio constitutional, the decree of the District Court should be affirmed in so far as it holds that the amount of the tax in excess of Fourteen Thousand Nine Hundred Twenty-six Dollars ($14,926.00) is invalid.

Respectfully submitted,

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